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8 **IN THE SUPREME COURT**
9 **STATE OF ARIZONA**

10 PETITION TO REPEAL OR) Supreme Court No. R-10-0016
11 AMEND ARIZONA SUPREME)
12 COURT RULE 45) **Reply to Comment of the State**
13) **Bar**
14)
15)
16)
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19 Mr. Furlong has advanced a number of arguments, those being that: 1)
20 education has great merit; 2) other professions have mandatory continuing
21 education; 3) the Bar was serious and thorough in making its decision to impose
22 MCLE; 4) the Bar allows other individuals and organizations besides the Bar to
23 offer MCLE; 5) MCLE is not that expensive.
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25

18 On the Merits of Education

19
20 I think that I may speak respectfully on behalf of Mr. Held and agree that
21 education, particularly in a serious profession such as the law, is indeed invaluable.
22 However, the debate here does not turn upon whether or not education is
23 valuable. Rather it turns upon whether or not Arizona's lawyers, who presumably
24 average at least over twenty years of education apiece, need to be forced to pay for
25

1 a certain kind of education. Reciting the merits of education is, therefore,
2 irrelevant to the disagreement at hand.

3 4 On Other Professions

5 The behavior of other professions may inform and educate us to some
6 degree, but merely acknowledging the existence of another profession's continuing
7 education requirement tells us little to nothing. For example, as compared to
8 members of the Arizona Bar, the other profession may 1) be subject to a highly
9 different membership, both in terms of education and lifestyle; 2) be doing the
10 wrong thing itself by implementing a mandatory education program; 3) offer a
11 highly dissimilar service to its customers.

12 This is not the right forum, and we are likely not the right people, to
13 evaluate the success or failure of other professions' educational systems. Saying,
14 therefore, that "they are doing it, too," not only has very little bearing on our issue,
15 and moreover, suggests far more knowledge of their internal situations and
16 motivations than we attorneys probably possess.

17 18 On the Bar's Seriousness

19 I appreciate the Bar's efforts in determining that professional violations
20 were occurring in Arizona, and that other jurisdictions had MCLE programs, when
21 it first recommended the imposition of MCLE upon Arizona's lawyers. The
22 quality of the Bar remains a serious, ongoing concern, thus this debate. The Bar's
23 efforts to impose the MCLE regime of over twenty years ago are not in question.

24 25 On the Existence of Other CLE Providers

1 This contention raises a number of troubling issues. Firstly, while many
2 outside sources of CLE do exist, the State Bar possesses, if not a monopoly, an
3 undisputedly strong market advantage in being able to communicate with, and
4 command the attention of, every lawyer licensed in Arizona. It possesses the
5 power to compel avenues of continuous contact with members, and because of its
6 institutional gravitas and the potential impact of its actions upon its members,
7 communications from the Bar cannot be ignored. Attorneys are therefore a
8 captive audience who, if viewed as consumers, are almost guaranteed to review any
9 potential CLE offerings from the Bar.

10 Furthermore, the behavior of the Bar has demonstrated that it behaves not
11 like an educational institution, but rather, like a corporate marketing department.
12 For example, instead of offering simple, flat-rate sheets for all of its available
13 products and services, the Bar uses attention-getting language, fonts and ad design
14 to encourage the consumption of “discount programs” and “early sign-on
15 bonuses,” among other incentives, for particular programs. The Bar offers
16 enticements to certain CLE programs and materials, suggesting that attorneys will
17 be able to expand their practices (essentially, to make more money) by learning
18 about a particular area of law with which they are unfamiliar. This is technically an
19 advertisement for more education, but does not seem strictly designed to improve
20 the quality of the bar. Rather, it seems designed for getting attorneys to purchase
21 seminars or materials in their hopes of being able to charge fees for different types
22 of cases.

23 This behavior would not be quite as troubling were it not paired with the
24 MCLE requirement, whereby attorneys are required to purchase--if not specific
25 types of product or service--a certain sum total of offerings.

1 Organizations and individuals other than the Bar itself do offer CLE.
2 However, an individual attorney cannot simply read a new case, then call his
3 friends and offer to explain it to them, thereby giving them all CLE credit.
4 Gaining formal institutional approval of CLE offerings passes through the Bar,
5 which is why many CLE presenters seem to be the same people and institutions.
6 Although the data are not available to me at present, it might prove fruitful to
7 study the connections between the major CLE presenters and organizations, and
8 the Bars, Bar leaderships and large firms of the many states. Even if there were no
9 such relationships, though, the Bar's command of a captive audience of required
10 consumers makes its participation in the MCLE process troublesome. Physicians,
11 for example, are not allowed to also be pharmacists, peddling to their patients the
12 drugs they prescribe. This situation is even more intimate: the attorney requires
13 the Bar's approval, and only the Bar's approval, for her or his continued livelihood,
14 is mandated to partake in costly education that the Bar is the major provider of,
15 and is regularly and thoroughly solicited to partake in the Bar's offerings.

16 Far from being unaware of the dynamic in this relationship, the Bar uses
17 MCLE as a marketing device. Hours of CLE satisfied by a course are one of the
18 prime pieces of information presented: sometimes topping the title of the course
19 in the font size and impact, and often preceding or overshadowing the course
20 description. The harder-to-get ethics credits are even more prominently
21 advertised.

22 The Bar's marketing behavior is likely not the product of malicious
23 intentions, but rather, an unintended result of the MCLE structure. Any
24 organization presented with such a regulatory scheme, ready membership and the
25 power to make offerings would likely behave so. If CLE were not mandatory, the

1 Bar's urging of attorneys to take additional courses would come across as wholly a
2 noble task.

3 I urge the elimination of MCLE for the long-term image of the Bar. While
4 members of the public are not thought of as privy to the full CLE ministrations of
5 the Bar, legions of non-lawyer secretaries, educators, friends, family,
6 businesspeople and more do become aware of the pay-for-CLE process.
7 Ultimately, as the years pass, this may cause the Bar to be viewed less as a
8 regulatory authority or collegiate body, and instead, as an institution which exists
9 for the provision of MCLE. The entire process of advertising, creating catchy
10 descriptions and trying to enlist consumer-students is beyond the pale of what a
11 State Bar should be involved in. I would prefer to see my Bar focused elsewhere,
12 and when it focuses on education, I would prefer not to see it "selling" itself, but
13 rather, discussing the virtues of learning new types of law, unclouded by garish
14 displays of the admission fee and the mandatory hours credited!

15 Particularly as a young lawyer, who is just now building my relationship with
16 the Arizona Bar, I feel that the Court must consider that the primary way in which
17 I have become aware of the Bar as an organization likely to impact my life—even
18 before receiving my certificate of right to practice in the mail—was via its e-mail
19 solicitations to me to attend its MCLE offerings. I began receiving those even
20 before I knew my application for admission had been accepted.

21 Reviewing or restricting Bar advertising methods would not solve this
22 problem. The motivations for this behavior will compel similar actions for as long
23 as 1) CLE remains mandatory; 2) the Bar is in regular contact with its members; 3)
24 Bar members pay attention to the Bar. Because 2) and 3) in this paragraph are
25 both positive situations, the only way to alter the state of affairs is to eliminate 1).

1 Make CLE optional through the Bar, available through self-study, and part of
2 attorney self-regulation through the malpractice regime, and the situation will be
3 solved.

4
5 MCLE Is Not That Expensive

6 Being relative to the financial state of whichever attorney is making such a
7 claim, this argument is largely irrelevant. However, it bears mentioning again that
8 MCLE drives up end-costs to Arizona legal clients. In that way, MCLE mimics
9 medieval guild trade-protection regimes, which enforce member contributions in
10 order to control prices for member services. Our Arizona public would be better
11 served by lawyers who could direct and time their own continuing education, and
12 then not have to pass on increased costs to those who purchase their services.

13 There will always be bad apples, and allowing them to sneak through the
14 system by sleeping through a PowerPoint presentation (or downloading one to
15 their computer and then not watching it) does nothing more to improve the
16 quality of the Bar than sitting on one's hands. Those who want to avoid or "fake"
17 CLE will always be able to find a way to do so, and more stringent requirements
18 will do nothing except further penalize lawyers who would already be educating
19 themselves well anyway.

20
21 I therefore request that this Court approve Petitioner's request to repeal
22 Rule 45, Ariz. R. Sup. Ct.

23 RESPECTFULLY SUBMITTED this 13 day of May, 2010.

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Trevor S. Draegeth